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Board Decisions - NYS PERB

New York State Public Employment Relations  
Board (PERB)

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7-1-1975

## State of New York Public Employment Relations Board Decisions from July 1, 1975

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from July 1, 1975

### Keywords

NY, NYS, New York State, PERB, Public Employee Relations Board, board decisions, labor disputes, labor relations

### Comments

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD  
50 WOLF ROAD  
ALBANY, NEW YORK 12205

BOARD MEMBERS

ROBERT D. HELSBY  
CHAIRMAN  
JOSEPH R. CROWLEY

MINUTES OF BOARD MEETING  
July 1, 1975  
Albany, New York

PRESENT:

ROBERT D. HELSBY, Chairman  
JOSEPH R. CROWLEY, Member  
FRED L. DENSON, Member

Staff: Jerome Lefkowitz, Deputy Chairman  
Martin L. Barr, Counsel  
Paul E. Klein, Director of Public Employment Practices & Representation  
Ellen K. Zimmermann, Secretary to the Board

1. Minutes of June 24, 1975 Board meeting approved.

2. Decisions and Orders

- A. U-1052 & U-1130 - In the Matter of Town of Orangetown, Respondent, and Town of Orangetown Unit, Rockland County Chapter, Civil Service Employees Association, Inc., Charging Party. (#2A-7/1/75)
- B. U-1319 - In the Matter of Board of Education of Malone Central School District, Respondent, and Malone Central Teachers Association, Charging Party. (#2B-7/1/75)
- C. U-1243 - In the Matter of Faculty Association of the Community College of The Finger Lakes, Respondent, and County of Ontario, Charging Party. (#2C-7/1/75)
- D. U-1499 - In the Matter of Village of Malone, Respondent, and Malone Village Unit of Franklin County Chapter, C.S.E.A., Charging Party. (#2D-7/1/75)

Certification after election

E & F C-1233 - In the Matter of Town of Greenport, Employer, and Town of Greenport Unit, Columbia County Chapter, Civil Service Employees Association, Inc., Petitioner. (#2E and #2F-7/1/75)

G. C-1235 - In the Matter of County of Oneida and Oneida County Sheriff's Department, Joint Employer, and Oneida County Deputy Sheriff's Benevolent Association, Petitioner, and Oneida County Chapter, CSEA, Inc., Intervenor. (#2G-7/1/75)

Certification without election

H. C-1237 - In the Matter of New York City Transit Authority, Employer, and City Employees Union, Local 237, International Brotherhood of Teamsters, Petitioner. (#2H-7/1/75)

July 1, 1975

- I. C-1224 - In the Matter of Incorporated Village of Port Jefferson, Employer, and Civil Service Employees Association, Inc., Petitioner. (#2I-7/1/75)

3. Board Administration

- A. U-1012 - In the Matter of Hempstead Union Free School District, Respondent, and Hempstead Schools Association of Administrators, Charging Party. After reviewing Counsel's June 12 memorandum (#3A-7/1/75), the Board unanimously agreed that (1) retroactivity to the date of the salary increases for Messrs. Crawford and Watkins was intended; (2) the requisite formal demand should be made to comply with this intention; and (3) if the District refuses to comply with the Board's order, contempt proceedings should be commenced. Counsel to so inform the parties.
- B. Role of Counsel's Office with respect to extreme provocation allegations in strike proceedings. After considering memoranda of June 14 and 20, 1975 (#3B-1 & 2-7/1/75) on staff role regarding extreme provocation in strike proceedings, the Board agreed that staff will informally explore this situation further when it schedules meetings in the Fall with school administrators and school union personnel. After such "work-out", staff will report conclusions and recommendations to the Board.
- C. C-1249 - In the Matter of New York State Thruway Authority. After hearing oral argument today with regard to the Director of Public Employment Practices and Representation's investigation of the sufficiency of SEIU showing of interest, the attached letter was issued to the parties. (#3C-7/1/75)
- D. Scope of Negotiations disputes that are subject to procedures of OCB. The Board considered procedures involving scope of negotiations disputes that are the subject of the procedures of Office of Collective Bargaining and implemented the attached memorandum (#3D-7/1/75). It was agreed, however, that this procedure would not be formalized into any hard and fast memorandum of understanding. Instead, this outline would simply serve as an informal guideline in handling the matters in question.

Next Board meeting will be held on August 19, 1975 at 9:30 a.m. or prior thereto, at the pleasure of the Board.

Eileen K. Zimmerman  
Secretary to the Board

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATION BOARD

#2A-7/1/75

In the Matter of  
TOWN OF ORANGETOWN,

Respondent,

-and-

TOWN OF ORANGETOWN UNIT, ROCKLAND COUNTY CHAPTER,  
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Charging Party.

BOARD DECISION AND

ORDER

CASE NOS. U-1052

U-1130

This case comes to us on the exceptions of the Town of Orangetown Unit, Rockland County Chapter of the Civil Service Employees Association, Inc. (CSEA) from a decision of a hearing officer dismissing its charge that the Town of Orangetown (employer) had refused to negotiate in good faith with it in violation of Civil Service Law Section 209-a.1(d) by failing to pay the salary scales for certain reallocated positions as set forth in a then current agreement. The underlying dispute involved the incremental step at which re-allocated employees should be paid following reallocation. CSEA alleged that a reallocated employee should be placed on the same incremental step in the re-allocated grade as he had been in the previous grade. The employer alleged that upon reallocation the employee should be paid the same salary as in the previous grade, provided, however, that if the salary for a step in the higher grade did not coincide with his previous salary, he should be placed on the next higher incremental step. Both CSEA and the employer relied upon the current contract and interpretations of it in support of their respective positions. Although that contract provided for binding arbitration, salary disputes were excluded from arbitration; thus, the grievance mechanism did not provide a procedure for the final resolution of this dispute. Nevertheless, the hearing officer declined to reach the underlying dispute as he concluded that the charge did not

allege a unilateral change in any existing term or condition of employment. He determined that "[t]he sole issue presented is one of interpretation of a contract" and dismissed the charge.

The relationship between an employer's contractual duty to abide by its contract and its statutory duty not to alter terms and conditions of employment unilaterally is a matter that we addressed ourselves to on a number of prior occasions. Unfortunately, our words in some decisions have been at variance with our actions in others. CSEA's exceptions in the instant case confront the difficult issue directly and, in order to resolve that issue, we must resolve the confusion. The exceptions raise two points -- (1) the unilateral action of an employer in failing to pay agreed-upon salary increases is a violation of that employer's duty to negotiate in good faith; thus the hearing officer erred in declining to consider the underlying dispute, and (2) the evidence supports CSEA's posture in the underlying dispute. It is the first exception that focuses our attention on the critical issue.

#### Relevant Prior Decisions

We first considered the relationship of an alleged contract violation to the prohibition against unilateral changes in terms and conditions of employment in Matter of East Meadow Teachers Association, 4 PERB 3659 (1971). In that decision we confronted the question (at p. 3661), "Does this Board have general jurisdiction to police and enforce negotiated agreements between public employers and employee organizations within this State?" We concluded that it does not. In doing so, we contrasted the Taylor Law with the statutes of Hawaii and Wisconsin.<sup>2</sup> Nevertheless, we found that conduct which might constitute a breach

<sup>1</sup> Section 89-13(a)(8) as reported in GERR RF 51:2018 provides that it shall be a prohibited practice for a public employer to "violate the terms of a collective bargaining agreement".

<sup>2</sup> Section 111.84(1)(e) as reported in GERR RF 51:5813 provides that it shall be an unfair labor practice for an employer "to violate any collective bargaining agreement previously agreed upon...."

of contract might also constitute the unilateral imposition of terms and conditions of employment in violation of statute. Indeed, in that case we found such to be the case and held the employer to be in violation of the law. A second case in which we dealt with the relationship between contract violations and unilateral changes in terms and conditions of employment is Matter of Board of Education of the City of New York, 5 PERB 3094 (1972) and 6 PERB 3022 (1973).

In the first opinion in that case we determined that an alleged breach of contract involving the reassignment of rating responsibilities from one group of supervisors to another did not raise a question of unilateral alteration of terms and conditions of employment because "[t]he assignment of responsibilities to one group of supervisors or to another is a management prerogative" (p. 3095) and thus not a term and condition of employment. In the second opinion we considered an allegation that the employer had unilaterally modified compensation practices for work performed by employees after normal school hours. We said (at p. 3023):

"The initial question before us upon reargument was whether, as alleged in the charge, the employer's action constituted a violation of the statute, a breach of contract, or both. If only a breach of contract (as in the case of reassignment of rating responsibilities) the matter is not subject to our jurisdiction. If only a violation of law, the matter is not subject to the grievance procedure. If, however, the same conduct constitutes both a violation of statute and a breach of contract, both procedures apply. Such is the case here."

It was in that case that we first enunciated the policy (at pp. 3023, 3024) that although

"[o]rdinarily, we decline to assert jurisdiction over such questions because of our policy not to interpret agreements where the parties have established a system of self-government that is designed to answer the question....[w]e do not defer to the grievance procedure developed by the parties in the instant case because it lacks binding arbitration, [footnote omitted] and, therefore does not conclusively dispose of the issue."

The last case we discuss in which we articulated the proposition that breach of

an agreement by an employer does not, per se, constitute a refusal to negotiate in good faith, is Matter of Administrative Board of the Judicial Conference of the State of New York, 6 PERB 3032 (1973). In that case we said (at p. 3033),

"In its brief, the charging party argues that any contract violation constitutes a violation of [CSL] §§209-a.1(a) and (d); as a unilateral change in working conditions, it is a violation of the employer's duty to negotiate in good faith, and to the extent that it cannot be resisted by an employee organization, ~~it is an embarrassment to that employee organization that inevitably undermines its effectiveness....~~ Although this argument is not without some force, we reject the proposition that every contract violation, or even every rejection of a grievance award by a public employer is, per se, a refusal to negotiate or an interference with the organizational rights of public employees."

In this decision we contrasted the Taylor Law with the laws of Pennsylvania<sup>3</sup> and Nevada.<sup>4</sup> We did not deal with the alleged contract violation as a unilateral change in terms and conditions of employment in that case, but the circumstances were unique. The status of the charging party as a recognized or certified organization was not clear and we determined that its status as representative of the employees must first be resolved under our representation procedures.

Against the East Meadow, New York City Board of Education and Judicial Conference cases, in all of which we distinguished between contract and statutory violations, we now consider three cases which are among several in which we found the violation of a contract to have constituted a refusal to negotiate in good faith. The first of these is Matter of Board of Education of the City of

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<sup>3</sup> Section 1201(a), as reported in GERR RF 51:4716 prohibits public employers from "refusing to comply with the provisions of an arbitrator's award".

<sup>4</sup> Our decision quoted the Nevada Law as prohibiting local government employees and their organizations from violating the terms of a collective bargaining agreement. That language is not now found in the Nevada Law as reported in GERR RF 51:3711, et seq.



Buffalo, 4 PERB 3754 (1971). In that case we ascertained that although the employer had sufficient funds to apply to the second year of a two-year agreement, it refused to do so because it did not have sufficient funds to apply to both contract matters and to noncontract matters that it deemed to be more important. We declined to defer to the contractual arbitration procedure in that case, saying (at p. 3756):

"A sine quo non for such deference would appear to be that the unilateral action taken is based upon a substantial claim of contractual privilege (citation omitted).

In the case before us, it cannot be said that the subject unilateral changes were based upon a substantial claim of contractual privilege; rather, the record seems clear that the unilateral changes herein complained of were made without any color of right under the contract."

The second case is Matter of Yonkers Housing Authority, 7 PERB 3033 (1974). In that case we determined that the employer violated its duty to negotiate in good faith when it violated its contractual obligation to pay increments while negotiating a successor contract. Confirming our decision, the Appellate Division, Second Department said, in Matter of Municipal Housing Authority v. PERB, 46 App.Div 2d 911 (1974):

"Petitioner's conduct, during the life of the existing agreement and while negotiations for a new agreement were in progress, could be interpreted, as intended to exert economic pressure and went right to the heart of whether petitioner was bargaining in good faith."

The third case is Matter of Jefferson County Board of Supervisors, 6 PERB 3063 (1973). We found this case to be like the Buffalo case in that the employer was repudiating a contract rather than relying upon it for its conduct. Asserting jurisdiction over the breach of contract, we found that it constituted a violation of the statute. On appeal, the Appellate Division, Fourth Department (Matter of Jefferson Board of Supervisors v. PERB, 44 App.Div 3d 893 [1974]), found that PERB had jurisdiction over the charge that the employer had refused

to negotiate in good faith when it failed to fund a merit salary increment that had been agreed to. It further found (at p. 894), "that there was substantial evidence to support PERB's determination that petitioner attempted unilaterally to alter its contract with the Faculty Association with respect to merit increments"<sup>5</sup>.

#### Discussion

Reviewing what we have said and what we have done in prior cases and considering the language of Civil Service Law Section 209-a.1(d), we are persuaded that conduct which constitutes a violation of a collectively negotiated agreement will almost invariably constitute a unilateral change in terms and conditions of employment, and thus a refusal to negotiate in good faith. The only exception that comes to mind is when the contract clause that is claimed to have been violated does not involve a mandatory subject of negotiations, as in New York City Board of Education.

The public policy underlying the Taylor Law is to promote harmonious and cooperative relationships between governments and their employees (CSL §200). We can conceive of few acts that are as disruptive to harmonious and cooperative relationships as is the disregard of collectively negotiated agreements. Thus, given the responsibility of this Board to advance the public policy underlying the Taylor Law and to prevent improper practices, we deem it unreasonable to interpret our jurisdiction so narrowly as to exclude unilateral changes in terms and conditions of employment that may also constitute violations of contract. The decision of the Appellate Division in Jefferson County supports this analysis. We have, however, and will continue to exercise restraint in connection with this jurisdiction. It is also the policy of the Taylor Law to

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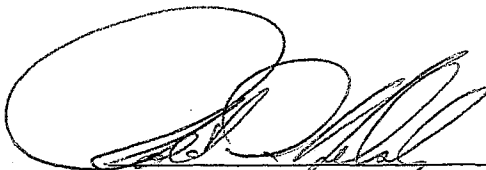
<sup>5</sup> PERB's order was reversed on other grounds. The court held that PERB did not have authority to direct the employer to comply with its contract. This reversal was affirmed by the State Court of Appeals at \_\_\_ NY 2d \_\_\_ (1975).

encourage public employers and employee organizations to agree upon procedures for resolving disputes (CSL §200). Thus, where an employer that is charged with unilateral action defends its conduct on the basis of a claim of contractual right, and where the parties have agreed upon binding arbitration to resolve disputes between them, we will defer to the arbitrator in accordance with the standards set forth in our decision in Matter of New York City Transit Authority, 4 PERB 3669 (1971). Where there is no serious claim of contractual right as in Buffalo Board of Education and Jefferson County, or where arbitration is not available as in New York City Board of Education or in the instant case, we will not withhold our jurisdiction.

This brings us to CSEA's second objection, to wit, that the evidence supports its posture in the underlying dispute. This is a question that should be resolved by the hearing officer in the first instance.

NOW, THEREFORE, we remand this case to the hearing officer for a determination on the merits of the charge.

Dated: Albany, New York  
July 1, 1975



Robert D. Helsby, Chairman



Fred L. Denson

DISSENT OF BOARD MEMBER, JOSEPH R. CROWLEY

It would seem that the thrust of the majority's decision is that the denial of any contractual benefits by an employer will constitute an improper practice and thus be subject to this Board's jurisdiction absent any provision for binding arbitration.

This Board has concluded in the past that it does not have plenary authority to administer and enforce contracts between public employers and employee organizations.<sup>1/</sup> I regard this conclusion as sound and as one contemplated by the Legislature of this State in that the Legislature did not opt as other jurisdictions did to make a breach of such an agreement an improper practice.<sup>2/</sup> The majority decision is a departure from such conclusion.

Under the holding of the majority, a refusal by a public employer to pay an individual employee overtime or a holiday premium allegedly due under a contract would be deemed a unilateral change in terms and conditions of employment and thus a prima facie improper practice. As noted supra, it does not seem that the Legislature intended such a result. Once negotiations have resulted in an agreement, the parties may and should agree upon procedures for enforcement, and absent such agreement, may seek enforcement in the courts.

Further, the course charted by the majority deeply and extensively involves this Board in contract interpretation.

I do not find that this Board has been granted broad jurisdiction to interpret a collective agreement. Admittedly, there may be occasions when it is necessary for this Board to interpret provisions of an agreement, but to the

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1/ East Meadow Teachers Association, 4 PERB 3659 (1971); New York City Board of Education, 6 PERB 3022 (1973); cf NLRB v. Strong, 393 U.S. 357, 360.

2/ Cf Wisconsin Sec. 111.84(1); see FN 2 in majority opinion.

limited extent of determining whether there has been a statutory violation, for example, to determine whether an employee organization has waived its right to negotiate on a particular subject so as to permit unilateral action by an employer.<sup>3/</sup>

In summary, I would find that in situations where an employer unilaterally institutes or establishes a term of employment not expressly provided for in the agreement or withdraws a benefit not provided for in the contract without negotiating about it with the representative organization, this Board will take jurisdiction of a charge even though the employer relies upon a provision in the contract claiming either a right so to do or as constituting a waiver by the employer organization of its right to negotiate re same.

However, in a situation where the employer refuses to implement an express provision in the contract, or does so in a manner which the employee organization feels is not in accordance with the provision in the contract, what would be involved is a pure contractual question and the enforcement of the contract as such, and thus outside the jurisdiction of this Board. In brief, when an employer's obligation to act or not to act is wholly contractual, the enforcement of such obligation should be dealt with either by arbitration (if the parties had so agreed) or by a plenary action.

In the instant case, I agree with the hearing officer that this is solely a question of interpretation as to how the contract should be implemented. I would affirm the hearing officer.

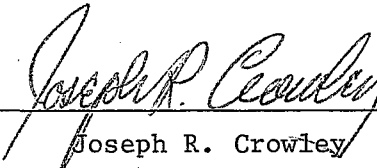
I realize that the conclusion reached by the majority is one designed to prevent the disruption of harmonious and cooperative relationships between public employers and employee organizations which disruption can be brought into being by the disregard of a negotiated agreement and also to avoid the necessity of relegating aggrieved employees to the delays and inconveniences

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<sup>3/</sup> Cf NLRB v. C & C Plywood, 385 U.S. 421.

which may be attendant in plenary actions. However, I believe that the problem is one that should be addressed by the Legislature, either to expressly provide that breach of a negotiated agreement will be deemed an improper practice or to mandate by legislation the inclusion of a grievance arbitration clause in all agreements between public employers and employee organizations representing public employees.

Dated: July 1, 1975  
Albany, New York

  
\_\_\_\_\_  
Joseph R. Crowley

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

#2B-7/1/75

In the Matter of

BOARD OF EDUCATION OF MALONE CENTRAL SCHOOL  
DISTRICT,

Respondent,

- and -

MALONE CENTRAL TEACHERS ASSOCIATION,

Charging Party.

:  
:  
: BOARD DECISION AND  
: ORDER

:  
: CASE NO. U-1319

This matter comes before us upon exceptions filed by the Malone Central Teachers Association (hereafter referred to as the Association), the charging party, from a decision by the hearing officer dismissing its improper practice charge against the Board of Education of the Malone Central School District (hereafter referred to as the Board of Education), the respondent. The charge alleged that the employer violated Sections 209-a.1(a), (b) and (d) of the Public Employees' Fair Employment Act (hereafter referred to as the Act<sup>1/</sup> by unilaterally withdrawing on September 9, 1974 the previously enjoyed benefit of binding arbitration of grievances while the parties were negotiating a successor contract to one that expired the previous June.

<sup>1/</sup> These sections of the Act make it an improper employer practice deliberately "... (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights; (b) to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights; ... (d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees."

3867

The matter was submitted to the hearing officer on a stipulated record which among other things indicated that in the Spring of 1974 the parties began negotiations for a successor agreement to the one expiring on June 30, 1974. The stipulated record also provided the following:

"The Board of Education did not offer a written contract proposal of its own and both parties agreed that all items in the then current contract, which was due to expire on June 30, 1974, would remain the same, unless either party requested that a particular item be modified or amended.

"The written proposals offered by the Malone Central Teachers Association did not seek a modification or amendment in the Maintenance of Staff or the Grievance-Arbitration provisions of the contract. The Board of Education did not offer any proposals that sought amendment of the Maintenance of Staff or the Grievance-Arbitration provisions. Furthermore, the amendment or modification of these matters were not discussed during the negotiations.

"The only matter that remained unresolved between the parties during the entire course of negotiations was the subject of an economic package." (Emphasis supplied)

In June of 1974, the District's budget was defeated and in July of 1974, pursuant to an austerity budget, the dental hygiene program was eliminated. Thereafter, the Association lodged a grievance protesting the elimination of two dental hygiene positions which resulted from the discontinuation of the program. The employer denied the grievance on the basis that staffing was not "a negotiable item" or a grievable subject. The Association then demanded arbitration in August of 1974. The Board refused to arbitrate the matter and on November 6, 1974 successfully obtained a court order permanently staying the arbitration proceeding. At the same time, the Court vacated a stay that it had previously issued prohibiting the Association from proceeding with an improper practice charge filed with PERB in September, 1974. As a result, the improper practice charge was reactivated.



The hearing officer dismissed the charge on the basis that the parties had only reached a tentative agreement on the grievance arbitration procedure and that since a final contract had not been entered into, the grievance arbitration procedure was inapplicable. The hearing officer further determined that the subject matter sought to be arbitrated was not a mandatory subject of negotiations and thus could be unilaterally changed by the employer without the Taylor Law being violated.

We do not agree with the conclusions reached by the hearing officer. The terms of the stipulation indicate that the "parties agreed that all terms in the then current contract....would remain the same, unless either party requested that a particular item be modified or amended" (emphasis added) and that neither party proposed to change the grievance arbitration provisions.

Where, as in the present matter, the parties had a grievance arbitration procedure in a predecessor contract and where they had in fact agreed to incorporate it into a successor contract when consummated, then that grievance arbitration procedure is applicable and enforceable during the hiatus between the two contracts. We are aware that Article 7501 of the CPLR<sup>2/</sup> requires that agreements to arbitrate be in writing. Nonetheless, on the facts herein presented, we believe that there has been "sufficient compliance" with the statute as it has been interpreted by the Court of Appeals, Acadia Company, Inc. v. Edlitz, 7 NY 2d 348 [1960]. We view the agreement of the parties to include

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2/ "A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute. As amended L. 1963, c. 532, §47."

the old grievance/arbitration procedure into the successor agreement (as set forth in the parties' stipulation) as satisfying the Court of Appeals' interpretation of CPLR Article 7501 in that it effectively operates as an extension of the old agreement until such time as a new agreement is consummated containing the agreed upon clause. To hold otherwise (particularly in the absence of the employee organization's right to strike) would be potentially disruptive of the promotion of harmonious employee/employer relations as contemplated by the Act. The presence of this agreement makes our conclusion stronger than if it were grounded only on our reasoning in Matter of Triborough Bridge and Tunnel Authority, 5 PERB 3064 (1972) but that reasoning still applies. In that decision we held that an employer is obliged by law to maintain existing terms and conditions of employment during negotiations until the parties conclude a successor agreement. The obligation imposed by Triborough is not predicated upon the terms or even the existence of a prior contract but applies to all terms and conditions of employment however established including the grievance/arbitration procedure between the parties:

"It is of no consequence that the employee benefit withdrawn by respondent derived from an expired agreement. Our decision would be the same if during the course of negotiations an employer unilaterally withdrew such an employee benefit that had been previously enjoyed by the employees even if there had been no prior contractual duty to furnish the benefit."

We do not see that the Appellate Division's decision in the Poughkeepsie case<sup>3/</sup> has any precedential value with regard to the instant case since that case did not involve an agreement by the parties to carry forward the provisions of the old grievance arbitration procedure into the new contract. Moreover, the decision of the Supreme Court to permanently stay arbitration of this matter<sup>4/</sup>

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3/ 44 AD 2d 598, affd 75 Misc. 2d 931.

4/ Board of Education of Malone Central School District v. Malone Central Teachers Association, (Supreme Court, Franklin County, November 6, 1974).

is not dispositive of the issue as to whether or not any improper practice has been committed by the respondent. This Board has primary jurisdiction in this regard and we find that the respondent cannot unilaterally change the grievance arbitration procedure without prior negotiations concerning such change.

~~We further note that the basis of the charge and the issue presented~~ for consideration is the effectiveness of the grievance arbitration procedure during the hiatus between contracts and not whether the employer was within its rights when it reduced staff. The hearing officer erred in giving consideration to the underlying merits of the dispute to be arbitrated, i.e., the authority of the Board of Education to eliminate the two dental hygiene positions. A distinction is to be drawn between an improper practice charge which has as its basis the effectiveness of a grievance/arbitration procedure during the hiatus between contracts and an improper practice charge which is based upon an employer's refusal to arbitrate the merits of a particular dispute during the hiatus between contracts. Our decision here touches only upon the effectiveness of the grievance/arbitration procedure and not upon the arbitrability of the merits of the dispute. Arbitrability of the merits of a dispute which arises during the hiatus between contracts is properly determined by the arbitrator or by the courts using, inter alia, the criteria set forth in our Triborough decision.

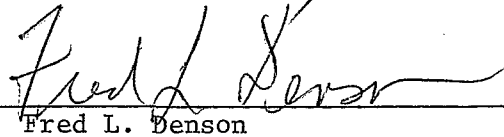
Thus, we conclude that the respondent has violated Section 209-a.1(d) of the Act by refusing to negotiate in good faith, the essential element of that violation being that it unilaterally withdrew the previously enjoyed benefit of binding arbitration of grievances while the parties were negotiating a successor contract to the one which expired the previous June. We find no similar violation based on Section 209-a.1(a) or (b) of the Act.

WE ORDER the Board of Education of Malone Central School District  
to negotiate in good faith with the Malone Central Teachers  
Association.

Dated: July 1, 1975  
Albany, New York



Robert D. Helsby, Chairman



Fred L. Benson

DISSENT OF BOARD MEMBER, JOSEPH R. CROWLEY

In dissenting from the conclusion reached by my brothers, I do not intend to indicate any measure of departure from the Triborough doctrine as such. Rather, I find the Triborough doctrine to be inapplicable in this instance.

The Triborough doctrine as enforced by this Board to date is not based on any contractual obligation of the parties for in Triborough we deal with a situation where the contract has expired. Conversely, the obligation to submit a dispute to arbitration is by way of an agreement in writing (CPLR §7501, et seq) . In the instant case the agreement to submit the dispute to arbitration had expired and no new agreement concerning an arbitration clause had been executed. Therefore, I find that the refusal on the part of the employer to submit the subject dispute to arbitration does not constitute a violation of §209-a.1(d). The Acadia decision relied upon by the majority does not, in my opinion, support their conclusion (In the Matter of the Arbitration between Acadia Company, Inc. and Irving Edlitz, 7 NY 2d 348).

In that case, the parties orally extended a written agreement containing an arbitration clause. The Court concluded that the oral extension of a written agreement was sufficient to satisfy the requirements of CPA §1449, now CPLR §7501. In the instant case, we have no such oral extension of the expired written agreement. Indeed, counsel for the charging party in his brief conceded that "the parties did not formally agree to an extension of the expiring contract." Rather, there was simply an understanding of the parties that in an agreement to be executed in the future incorporating economic terms still to be negotiated, such an agreement would include an arbitration clause. Thus, the facts in the instant case are so different from those in the Acadia decision that reliance on that decision here would seem to be misplaced.

I also question the power and jurisdiction of the Board to resolve an issue of arbitrability, namely, the existence of a written agreement to arbitrate; it seems clear that the Legislature has provided that arbitrability is a question to be resolved by the courts, CPLR §7501 et seq. Further, the issue of arbitrability in the instant case was submitted to the court pursuant to the statutory provision and it was therein determined that arbitration be stayed, Board of Education of Malone Central School District v. Malone Central Teachers Association, (Supreme Court, Franklin County, November 6, 1974).

Dated: July 1, 1975  
Albany, New York

  
\_\_\_\_\_  
Joseph R. Crowley

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

#2C-7/1/75

In the Matter of

FACULTY ASSOCIATION OF THE COMMUNITY COLLEGE OF  
THE FINGER LAKES,

:

BOARD DECISION AND

Respondent,

:

ORDER.

- and -

:

Case No. U-1243

COUNTY OF ONTARIO,

:

Charging Party.

:

This case comes to us upon the exceptions of the County of Ontario (hereinafter the County) from a decision of a hearing officer dismissing its charge that the Faculty Association of the Community College of the Finger Lakes (hereinafter the Association) refused to negotiate in good faith with it upon its demand for negotiations. The Charge had alleged a violation by the Association of CSL Section 209-a.2(b).

The hearing officer also dismissed charges by the Association that the County had violated CSL 209-a.1(a), (b), and (d) in that the County had improperly filed its improper practice charge in this case and that it had insisted upon mediation without first exhausting the possibilities of direct negotiations. A third aspect of the Association's charge is that the County had rejected consideration of the Association's demand for retroactivity. No exceptions were filed by the Association with respect to the hearing officer's dismissal of its charges.

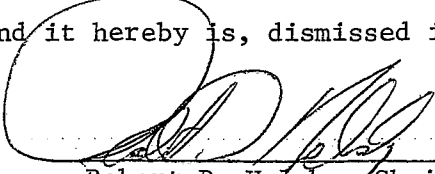
The County's exceptions enumerate seven dissatisfactions with the decision of the hearing officer. In essence these dissatisfactions relate to determinations by the hearing officer that delays and the conduct of negotiations attributable to the Association do not reflect any deliberate intention to delay negotiations, but rather derive from inefficient office procedures. The County also objects to findings by the hearing officer that its representatives must bear some responsibility for delaying negotiations. Finally the County challenges a finding of the hearing officer that the conduct of the Association at the August 15 negotiations' meeting when it insisted that the meeting be restricted to a discussion of negotiating procedures and it refused to negotiate substantive issues was not inappropriate. In connection with each of these dissatisfactions with the findings of the hearing officer, the County alleged that he overlooked or disregarded relevant evidence.

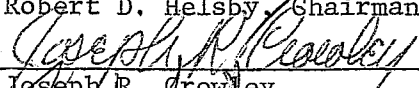
#### DISCUSSION

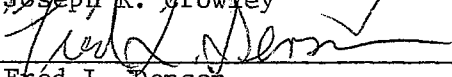
We have afforded the County an opportunity to present oral argument in support of its exceptions. We have also received from it an extensive brief and a reply brief responding to the brief submitted by the Association. Having reviewed the record and considered the oral and written arguments of the parties, we confirm the findings of fact and the conclusions of law of the hearing officer. On the analysis of facts and the reasoning contained in his opinion, we dismiss the County's charge.

NOW, THEREFORE, WE ORDER THAT the charge of the County of Ontario  
be, and it hereby is, dismissed in its entirety.

Dated: July 1, 1975  
Albany, N.Y.

  
Robert D. Helsby, Chairman

  
Joseph R. Growley

  
Fred L. Denson

3876



STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of  
VILLAGE OF MALONE,

Respondent,

-and-

MALONE VILLAGE UNIT OF FRANKLIN COUNTY  
CHAPTER, C.S.E.A.,

Charging Party.

#2D-7/1/75

BOARD DECISION AND ORDER

CASE NO. U-1499

On February 18, 1975 the Malone Village Unit of Franklin County Chapter, C.S.E.A. (CSEA) filed an improper practice charge under Section 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) alleging that the Village of Malone (Village) was committing an improper practice by refusing to negotiate in good faith with respect to shift scheduling demands made by the firefighters. Since the charge raised issues primarily involving a dispute between the parties as to the scope of negotiations under the Act, expedited treatment of the matter was accorded under Sections 204.2(b) and 204.4 of the Rules of Procedure.

On March 13, 1975 the parties entered into a stipulation which is reproduced verbatim in Appendix "A" to this decision.

On March 25, 1975 the Village moved to dismiss the charge on the grounds that it was not timely filed. In support of its position, the Village urged that CSEA's demands and its refusal to negotiate occurred in April of 1974 and that the charge was not filed until February 1975, which was beyond the four-month period during which our Rules permit the filing of a charge. Thereafter, the stipulated facts and motion were submitted to the Board for consideration.

A hearing was held on May 9, 1975 to consider the question of timeliness of the charge only. The facts that were stipulated to on March 13, 1975 were deemed sufficient to resolve the other issues. CSEA, through its witnesses, established that demands to negotiate the matter were made several times subsequent to the initial demand. More specifically, demands were made to either the Village negotiator or directly to the Village Board in December 1974 and again in January 1975. Thus, the issue presented to us is whether the four-month period began to run from the first demand and refusal or from the last demand and refusal.

It is our opinion that the time period for filing this improper practice began to run from the date of the last demand and refusal. The purpose of placing a four-month limitation on the period during which an improper practice charge can be filed is to prevent the prosecution of stale claims. Normally a four-month period is an adequate period for a potential charging party to investigate and assess the acts of the potential respondent, to make a determination as to whether a charge should be filed and, in fact, to prepare and file the charge. While the Village's original refusal to acquiesce in the demand to negotiate shift schedules in the present case was not in the nature of a continuing violation, neither was CSEA precluded from renewing that demand. Each presentment of a demand to negotiate a mandatory subject of negotiations and each refusal gives rise to a new charge until the matter has been ultimately disposed of by this body or by agreement of the parties. The negotiation process, by its very nature, is one of give-and-take. To require a potential charging party to file its charge after the first refusal of its demands to negotiate a particular subject, reduces the degree of flexibility needed to carry out meaningful and effective negotiations. Thus, we conclude that the charge in the present matter was timely filed, based on the date of the last demand and refusal to negotiate.

3878

With regard to the negotiability of the subject of scheduling of shifts of the firefighters, we have constantly and consistently held that this is a mandatory subject of negotiations (In the Matter of the City of White Plains, 5 PERB 3013 [1972] and In the Matter of the City of Albany, 7 PERB 3142 [1974]). Our position was clearly articulated in the White Plains case, where we said (at p. 3015):

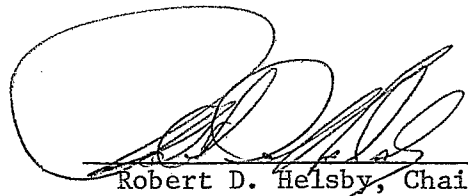
"It is the City alone which must determine the number of firemen it must have on duty at any given time. It cannot be compelled to negotiate with respect to this matter. However, there are many ways in which the schedules of individuals and groups of firemen may be manipulated in order to satisfy the City's requirement for fire protection. It is this manipulation of the schedules of individuals and groups of firemen which is involved in the Fire Fighters' demand. Within the framework which the City may impose unilaterally that a specified number of Fire Fighters must be on duty at specified times, the City is obligated to negotiate over the tours of duty of the Fire Fighters within its employ."

A proceeding under Sections 204.2(b) and 204.4 of our Rules of Procedure is designed to determine whether certain demands constitute mandatory subjects of negotiations. An employer's refusal to negotiate over such matters pending our determination on negotiability need not carry with it any implication of impropriety, notwithstanding the fact that the matter arises under Section 209-a of the Act, which declares refusal to negotiate in good faith to be an improper practice. Our order reflects this consideration.

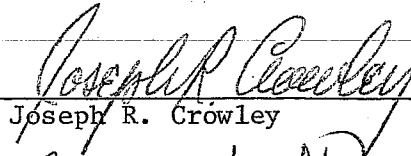
We sustain the charge, and,

WE ORDER that the Village of Malone negotiate  
in good faith with CSEA with respect  
to the demand of shift scheduling<sup>1</sup>.

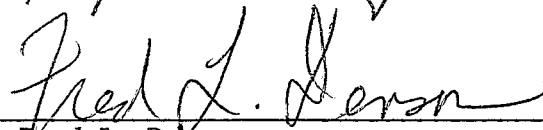
Dated: Albany, New York  
July 1, 1975



Robert D. Helsby, Chairman



Joseph R. Crowley



Fred L. Denson

1 While the case was accorded expedited treatment, an inordinate delay in reaching a decision on the merits was caused by the scheduling of an additional hearing on respondent's motion to dismiss. Additional delay was caused by reason of the unavailability of a transcript on a timely basis from the hearing reporter.

Attch.

3880

APPENDIX "A"

In the Matter of  
Village of Malone

Case No. U-1499  
STIPULATION

It is hereby stipulated and agreed by and between the parties that:

- 1) On or about April 9, 1974 the Malone Village Unit of Franklin County Chapter, C.S.E.A., presented i[t]s negotiating proposals for a collective agreement for the fiscal year June 1, 1974 thru May 31, 1975 to the Village of Malone. These proposals included a proposal that unit employees in the Fire Department "remain on the 24 hour work shift in effect on January 1, 1974." (The contractual work shift language as of January 1, 1974 is attached.) [Appendix "B"]
- 2) At that time the Village stated its position that said proposal is not a mandatory subject of negotiations, and still maintains that position.
- 3) The parties agree that the charge herein raises primarily a dispute as to the scope of negotiatives [negotiations], i.e., whether said proposal is a mandatory subject of negotiations, and request PERB to accord expedited treatment to this matter pursuant to §204.4 of its Rules of Procedure.

Dated: March 13, 1975

(signed) Bryan J. Hughes  
Village of Malone

(signed) William F. Maginn Jr.  
For: Malone Village Unit, Franklin  
County Chapter, CSEA

C O P Y

APPENDIX "B"

From page 8 of Contract, under ARTICLE ELEVEN - WORK YEAR, WORK DAY AND WORK WEEK

"4. It is also agreed for Employees in the Fire Department, except the Fire Chief, for the period June 1, 1973, to May 31, 1974, the basic work day shall be a twenty-four (24) hour consecutive period and the basic work week shall be forty-two (42) hours on an annual basis, until January 1, 1974, at which time the work week shall be reduced to forty (40) hours."

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF

TOWN OF GREENPORT,

Employer,

-and-

TOWN OF GREENPORT UNIT, COLUMBIA  
COUNTY CHAPTER, CIVIL SERVICE  
EMPLOYEES ASSOCIATION, INC.,

Petitioner.

#2E-7/1/75

Case No. C-1233

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that Town of Greenport Unit, Columbia County Chapter, Civil Service Employees Association, Inc.,

has been designated and selected by a majority of the employees of the above named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

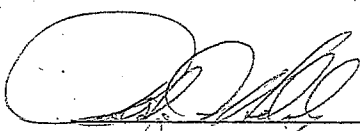
Unit: Included: All employees of the Town of Greenport employed in the Highway Department (laborer and the assistant superintendent), the Landfill Department (landfill attendant) and the Water and Sewer Department (laborer and working foreman).


Excluded: All other employees of the employer.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Town of Greenport, Columbia County Chapter, Civil Service Employees Association, Inc.,

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 1st day of July, 1975.

  
ROBERT D. HENSBY, Chairman

  
JOSEPH R. CROWLEY

  
FRED L. DENSON

3882

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF

#2F-7/1/75

TOWN OF GREENPORT,

Employer,

-and-

TOWN OF GREENPORT UNIT, COLUMBIA  
COUNTY CHAPTER, CIVIL SERVICE  
EMPLOYEES ASSOCIATION, INC.,

Petitioner.

Case No. C-1233

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that Town of Greenport Unit, Columbia County Chapter, Civil Service Employees Association, Inc.,

has been designated and selected by a majority of the employees of the above named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All police personnel.

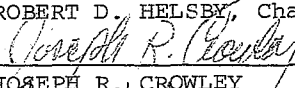
Excluded: the chief of police.


Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Town of Greenport Unit, Columbia County Chapter, Civil Service Employees Association, Inc.,

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 1st day of July, 1975.

  
ROBERT D. HELSBY, Chairman

  
JOSEPH R. CROWLEY

  
FRED L. DENSON



STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

#2G-7/1/75

In the Matter of  
COUNTY OF ONEIDA AND ONEIDA COUNTY  
SHERIFF'S DEPARTMENT,  
-and- Joint Employer,  
ONEIDA COUNTY DEPUTY SHERIFF'S  
BENEVOLENT ASSOCIATION, : Case No. C-1235  
-and- Petitioner,  
ONEIDA COUNTY CHAPTER, CSEA, INC.,  
Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that Oneida County Deputy Sheriff's Benevolent Association

has been designated and selected by a majority of the employees of the above named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit:


Included: All employees of the Oneida County Sheriff's Department.

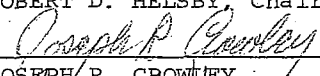
Excluded: Sheriff, Undersheriff, Captains, Secretary to Sheriff, and assistant mechanics.


Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Oneida County Deputy Sheriff's Benevolent Association

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 1st day of July, 1975.

  
ROBERT D. HELSBY, Chairman

  
JOSEPH R. CROWLEY

  
FRED L. DENSON

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of  
NEW YORK CITY TRANSIT AUTHORITY,  
Employer,  
-and-  
CITY EMPLOYEES UNION, LOCAL 237,  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
Petitioner.

: #2H-7/1/75  
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Case No. C-1237

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that City Employees Union, Local 237, International Brotherhood of Teamsters

has been designated and selected by a majority of the employees of the above named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit:


Included: All photographers and senior photographers.

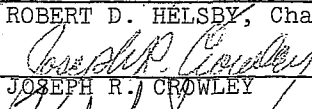
Excluded: All other employees.

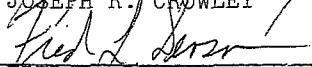
Further, IT IS ORDERED that the above named public employer shall negotiate collectively with City Employees Union, Local 237, International Brotherhood of Teamsters

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 1st day of July , 19 75.

  
ROBERT D. HELSBY, Chairman.

  
JOSEPH R. CROWLEY

  
FRED L. DENSON

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

#2I-7/1/75

In the Matter of :  
INCORPORATED VILLAGE OF PORT JEFFERSON, :  
Employer, :  
-and- : Case No. C-1224  
CIVIL SERVICE EMPLOYEES ASSOCIATION, :  
INC., :  
Petitioner. :

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that Civil Service Employees Association, Inc.

has been designated and selected by a majority of the employees of the above named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit:

Included: All full-time and regular part-time village employees.


Excluded: Elected officials, village attorney, village clerk, deputy village clerk, village treasurer, part-time recreation leader, seasonal and temporary employees and general highway foreman.


Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Civil Service Employees Association, Inc.

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 1st day of July, 1975.

  
ROBERT D. HELSBY, Chairman

  
JOSEPH R. CROWLEY

  
FRED L. DENSON

MEMORANDUM

#3A-7/1/75

June 12, 1975

TO: The Board  
FROM: Martin L. Barr  
RE: Hempstead Public Schools, Case No. U-1012

We have been requested, in effect, to initiate contempt proceedings against the school district for non-compliance with that part of the PERB order requiring that the principals who are members of the Hempstead Schools Association of Administrators be granted a pay raise for the 1973/74 school year commensurate to the increase given to two principals who were not members of the Association. A brief history follows.

On May 13, 1974, upon affirming the hearing officer's conclusion that such action was motivated by union animus and constituted a violation of §209-a.1(c) and (d), PERB ordered, inter alia, that the district:

3. forthwith grant salary increases to all remaining building principals in the District comparable to the salary increases accorded to Crawford and Watkins.

Because the District refused to comply, PERB brought an enforcement proceeding which resulted, on January 17, 1975, in a judgment ordering compliance in all respects. The District did not appeal.

I have been advised that on April 17, 1975, the District adopted the following resolution:

RESOLVED, in accordance with the Decision of the Public Employment Relations Board of the State of New York in Case #U-1012 and in accordance with the Order of the New York State Supreme Court in Albany, New York, enforcing said Order, that Building Prin-

Ziegfeld v. Norworth, 148 A.D. 185, 191. In Ross v. Butler, 57 Hun. 110, 112, the court stated that the judgment sought to be enforced "shall be definite and certain, that there shall be no opportunity for ambiguity, but that the party proceeded against is to be adjudged to do a certain specific act; if it is to pay money, then to pay a specific sum of money." See also Matter of Battista, 176 M. 85, 86, holding that in order to punish for contempt, "an order or decree must direct without ambiguity and in language which may readily be understood by a layman. . ." and Dwyer v. Oyster Bay, 28 M. 2d 952, 953, holding that "the language of the order claimed to have been violated must be clear and unequivocal [emphasis in original]."

There can be little doubt that the intent of the PERB order was to requirement payment retroactive to the date the increases were improperly granted to the non-member principals. There is, perhaps, more doubt that the court can be persuaded that this is the only rational construction that can be given to the order. However, since it is necessary to construe the order or infer the maker's intent, the court may find it difficult to hold the district in contempt.

The issues thus raised for PERB's consideration are:

1. Whether retroactivity was intended;
2. If so, whether the requisite formal demand be made upon the District that it comply, the effect of which would be to make the district aware that a contempt proceeding is contemplated; and
3. If the district remains adamant, whether a contempt proceeding should be commenced.

MEMORANDUM

June 20, 1975

TO: Robert D. Helsby  
Jerome Lefkowitz

FROM: Martin L. Barr

RE: Participation of Counsel's Office with respect to extreme provocation in strike proceedings

Quite some time ago I asked Jerry Thier to give me his thoughts on the principles which should govern counsel's participation in the development of the record in strike proceedings with respect to the issue of extreme provocation. The attached is the memo that he prepared for me. I agree with the analysis and conclusions.

The question is not a new one. I think that our activities conducted in line with the considerations articulated in Jerry's memo are proper under the Law and necessary if the Board's responsibilities are to be properly carried out.

The complaints expressed by attorneys for NYSUT are not new. Similar complaints have been presented before. I believe that our present procedures should not be altered or counsel's role further diminished.

tn

N.Y.S. PUBLIC EMPLOYMENT  
RELATIONS BOARD  
**RECEIVED**  
JUN 20 1975  
CHAIRMAN'S OFFICE

3890

#3B-2-7/1/75

TO: Martin L. Barr

FROM: Jerome Thier

RE: Role of Counsel's Office with respect to extreme provocation allegations in strike proceedings.

In accordance with our conversation, I am setting forth my views with respect to development of the record in connection with allegations of extreme provocation made by employee organizations in strike proceedings.

To start, it must be borne in mind that the purpose of the strike proceedings, whether or not combined with improper practice proceedings, is to develop a record upon which the Board can determine the penalty, if any, to be imposed upon an employee organization where it appears that the employee organization has engaged in a strike against a public employer. One factor, of course, in determining the penalty, if any, to be imposed, is whether the employer has engaged in acts of extreme provocation.

It is my understanding that Counsel is charged by PERB's rules with developing the record necessary to enable PERB to make its determination, a responsibility which I believe PERB placed upon its Counsel in order to insulate its hearing officers and itself from any investigative role which might provide them with knowledge outside the record developed at a hearing. As you know, this is an essential element of fairness and due process in matters requiring a hearing.

This responsibility of Counsel brought claims by employee organizations, both in combined improper practice proceedings in which the same facts are alleged to constitute extreme provocation and an improper practice, and in strike proceedings alone, that PERB's Counsel is representing the employer. These organizations asserted that PERB's representative should not be in this position, urging that it destroys PERB's neutrality.

After considering these claims, the Board adopted a policy under which Counsel is to encourage public employers to intervene in strike proceedings where there is a claim of extreme provocation. The question now arises as to Counsel's role in developing the record upon a claim of extreme provocation when there is such intervention.

I believe Counsel's role should remain basically unchanged. While it may be good public relations to stay out of that part of the hearing which deals with extreme provocation, this can only be done when the employer is adequately developing the record. This is so because the ultimate responsibility for developing

3891



#3C-7/1/75

BOARD MEMBERS  
ROBERT D. HELSBY  
CHAIRMAN  
JOSEPH R. CROWLEY  
FRED L. DENSON

NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
50 WOLF ROAD  
ALBANY, NEW YORK 12205

July 1, 1975

Mr. John Geagan, Director of Organization  
Service Employees International Union, AFL-CIO.

Mr. John MacArthur  
NYS Thruway Authority

Richard Burstein, Esq.  
DeGraff, Foy, Conway & Holt-Harris

Re: C-1249 - NYS Thruway Authority

Gentlemen:

I am writing to you on behalf of my colleagues on the Public  
Employment Relations Board.

Earlier today we heard presentations from each of you regarding  
the procedures being followed by the Director of Public Employ-  
ment Practices and Representation in investigating the  
authenticity of the showing of interest in this matter. During  
the course of your presentations concern was expressed for the  
preservation of the confidentiality of persons executing showing  
of interest cards. Nevertheless, it was recognized that it is  
necessary on occasion to conduct an investigation to ascertain  
the authenticity of the showing of interest. We share both  
concerns.

Accordingly, we are instructing the Director of Public Employment  
Practices and Representation to review his methods in conducting  
the current and future investigations into the authenticity of  
showing of interest in order to maximize the preservation of  
confidentiality. When, because in his judgment issues of public  
interest outweigh the need to preserve strict confidentiality  
and the Director contemplates methods of investigation that  
might compromise that confidentiality, he shall discuss those  
methods of investigation with the Board before implementing  
them.

Very truly yours.

Robert D. Helsby

cc - Paul E. Klein, Esq.

3893





#3D-7/1/75

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD  
50 WOLF ROAD  
ALBANY, NEW YORK 12205

BOARD MEMBERS

ROBERT D. HELSBY  
CHAIRMAN  
JOSEPH R. CROWLEY

June 27, 1975

MEMORANDUM TO THE BOARD

FROM: Robert D. Helsby  
SUBJECT: Scope of Negotiations Disputes - NYC

The following procedure is proposed to avoid confusion and forum shopping in the event of scope of negotiations disputes that are subject to the procedures of OCB:

1. General Procedures -

PERB and OCB will send each other all jurisdictional documents relating to cases in which there is a possibility of simultaneous jurisdiction. PERB will invite OCB to have a representative participating in pre-hearing conferences in all such cases. (Should PERB be invited to have a representative participating in OCB conferences on such matters?)

2. Disputes that exclusively raise scope of negotiations questions:

- a. If the dispute is presented to OCB and not to PERB there is no problem. It should be handled by OCB.
- b. If a dispute is brought before PERB (it is irrelevant whether or not it is also brought before OCB), and the party respondent before PERB makes an objection in its answer to PERB's assertion of jurisdiction on the ground that it is a matter to be considered by OCB and indicating that it has commenced or will be commencing a scope of negotiations case before OCB, PERB should defer to OCB subject to PERB's right to reconsider (Collyer Standards) in the event that OCB's disposition of the case is unsatisfactory.
- c. If the dispute is brought before PERB (it is irrelevant whether or not it is also brought before OCB), and the respondent does not object to PERB's assertion of jurisdiction and does not request the matter be deferred to OCB, PERB and OCB will immediately confer as to how the case should be handled. Such cases will be decided on a case by case basis.

3894